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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GRAHAM JOSEPH FARMER,

Defendant and Appellant.

H025823

(Santa Cruz County
Super. Ct. No. FO2402)

Following the revocation of his probation, defendant Graham Farmer was sent to prison for seven years. Initially, defendant was given credit for 668 days spent in custody. The People later moved the trial court for a correction, which resulted in a reduction to 121 days of custody credit. On appeal, defendant claims that he is entitled to additional custody credits. Because we cannot determine defendant's entitlement on this record, we will remand this matter to the trial court for reconsideration of the calculation of custody credits.

BACKGROUND

While under the influence of methamphetamine, defendant attacked his girlfriend, kicking in a door and cutting her telephone line as she called 911. As a result, the Santa

Cruz County District Attorney's Office charged defendant with 12 counts of violating the Penal Code.¹

In August 2001, defendant entered a guilty plea to three of the 12 charges – two felonies (counts 7 and 8) and one misdemeanor (count 11). The prosecution agreed to dismiss the remaining counts as well as the two enhancement allegations.

In October 2001, the trial court sentenced defendant to seven years in prison for the felonies: six years on count 7, with a consecutive sentence of one year on count 8. The court suspended execution of that sentence for 60 months, placing defendant on probation on condition that he serve 365 days in the county jail and that he enter a drug treatment program upon his release from custody. As to count 11, the misdemeanor, the court imposed a sentence of 365 days in county jail, with credit for 220 days served. With respect to the felonies, the court advised defendant: "You are getting no credits on either of those two counts." Referring to the residential drug treatment program that was a condition of defendant's probation, the court stated that "the program credits are going on your misdemeanor. It means if you complete it, you will walk away from jail and the

¹ Further unspecified statutory references are to the Penal Code.

In this case (F02402), the information alleged that defendant committed: forcible rape (§ 261, subd. (a) (2); counts 1 and 6); forcible sodomy (§ 286, subd. (c) (2); count 2); forcible oral copulation (§ 288a, subd. (c) (2); counts 3, 4, and 5); residential burglary (§ 459; count 7); dissuading a witness (§ 136.1, subd. (c) (1); count 8); destruction of a telephone line (§ 591, count 9); destruction of property (§ 594, subd. (a); counts 10 and 12); and use of force against another person (§ 243, subd. (e) (1); count 11). As enhancements, the information further alleged that defendant tied the victim (§ 667.61, subd. (b); counts 1 through 6), and that defendant committed the crimes while released on bail (§ 12022.1; counts 1 through 9).

In another case (F01286), defendant was charged with violating Health and Safety Code section 11550; he pled guilty. Sentencing for both cases was heard together. In F01286, the court placed defendant on probation with the requirement that he serve 180 days in county jail. The sentence in F01286 is not at issue in this appeal.

program with still no credits, not a day credit against the seven years that I've imposed." Defendant acquiesced in those conditions.

Defendant was released from jail in either January or February 2002.² Instead of reporting for drug treatment upon his release from jail as required, defendant absconded to Idaho. In March 2002, a bench warrant was issued for defendant's arrest, and his probation was ordered revoked. Defendant was arrested and placed in custody in Idaho and eventually was extradited to Santa Cruz County.

In October 2002, a probation revocation hearing was held. The original sentencing judge did not preside over the hearing, nor were the same prosecutor or defense counsel present. Defendant admitted the probation violation. The court revoked suspension of defendant's sentence and ordered him to state prison for seven years. The court awarded defendant custody credits totaling 668 days, representing 446 days of actual custody plus 222 days of conduct credit. (See §§ 2900.5 [custody credits]; 4019 [conduct credits].)

In February 2003, the People moved the trial court for an order correcting the custody credits. The prosecution motion provided no information to guide the court's calculation; however, the probation department calculated a custody credit of 174 days, based on the dates and computations shown in its memorandum to the court. At the hearing on the motion, the court reduced defendant's credits to 121 days. The only explanation in the record for the judge's conclusion is his statement that "at least as my calculations and as I set it up, that there were should be [sic] 121 days actual credit on the state prison sentence, F02402, with 81 actual and 40 good and work."

² There is a conflict in the record on this point. A release date of January 23, 2002 appears in various places in the record, including the District Attorney's bench warrant affidavit. A release date of February 23, 2002 appears in other places in the record, including some portions of the 2002 probation department reports.

This appeal by defendant ensued.

CONTENTIONS

Defendant contends that the trial court failed to award him custody credits in the proper amount. Specifically, he complains that he was denied credit for his custodial time in Idaho. Defendant seeks an amendment of the judgment to include an additional 198 days of credit.

In response, the People urge us to dismiss the appeal, arguing that the question of defendant's claim of entitlement to additional custody credits is not properly before us because he failed to first assert it in the trial court. As an aside, the People refer to evidence in the record, which they claim shows that defendant is not entitled to additional credits.

DISCUSSION

1. Should This Appeal Be Dismissed?

As the People correctly observe, the issue of custody credits should be tendered to the trial court in the first instance. (See § 1237.1. See also, e.g., *People v. Little* (1993) 19 Cal.App.4th 449, 452, in which this court urged counsel disputing the calculation of custody credits “to attempt correction in the trial court before elevating the issue to a formal appeal.”)

Here, however, the issue *was* tendered to the trial court – by the People's own motion. At the People's behest, the court recalculated defendant's custody credits. To be sure, the record does not indicate whether defendant sought reconsideration or further correction. But regardless of whether he did so, defendant is entitled to appellate review of the order resulting from the motion. (Cf., e.g., *People v. Thornburg* (1998) 65 Cal.App.4th 1173, 1175, overruled on other grounds in *People v. Buckhalter* (2001) 26 Cal.4th 20 [defendant not required to renew his previous request for recalculation of custody credits before appealing].)

In short, the People's dismissal argument has no merit.

2. Did The Trial Court Err In Calculating Defendant's Custody Credits?

We turn to the merits of defendant's contention of error in the recalculation of his custody credits. The crux of defendant's argument is that the trial court failed to award credit for the time that he was in custody in Idaho. (See *In re Joyner* (1989) 48 Cal.3d 487, 494.)

a. General Principles

Criminal defendants convicted of felonies are entitled to credit for time spent in custody prior to sentencing. (§ 2900.5.) Defendants also are permitted credits for good conduct during pre-sentence custody. (§ 4019.) When the facts are undisputed, a defendant's entitlement to custody credits presents a question of law for the appellate court's independent review, since the trial court has no discretion in awarding custody credits. (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 473.)

Under the statute, "it is the duty of the sentencing court to calculate actual days spent in custody" for purposes of determining custody credits. (*People v. Thornburg, supra*, 65 Cal.App.4th at pp. 1175-1176, citing § 2900.5, subd. (d). See also, e.g., *People v. Shabazz, supra*, 175 Cal.App.3d at p. 473.)

Defendants may waive their entitlement to custody credits. (*People v. Johnson* (1978) 82 Cal.App.3d 183, 188.) Any waiver must be knowing, intelligent, and voluntary. (*Ibid.* See also, e.g., *People v. Harris* (1991) 227 Cal.App.3d 1223, 1227.) Defendants may waive future custody credits, as well as those that have already accrued. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1921.)

b. Application

In this case, the trial court calculated defendant's custody credits at three points in the proceedings. First, at the original sentencing hearing in October 2001, the judge calculated defendant's accrued custody credits at 220 days. With defendant's agreement, the judge applied those credits to the misdemeanor conviction, admonishing defendant that he would get no credit if sent to prison. Next, at the probation revocation hearing in

October 2002, a different judge executed the previously imposed prison sentence, giving defendant 668 days of custody credits. Finally, at the hearing on the People's correction motion in February 2003, the original sentencing judge reduced defendant's custody credits to 121 days.

As noted above, defendant challenges that final calculation on the ground that it fails to include credit for time spent in custody in Idaho. The People make no real effort to confront that contention on the merits. In a footnote, they note only "that there is evidence that appellant is not entitled to additional presentence custody credits," and they refer us to defendant's waiver. Based on the parties' appellate arguments, it does not appear that defendant is challenging his waiver of accrued credits at the original sentencing hearing. Nor does it appear that the People are contending that defendant waived future custody credits. The question thus seems to be a simple mathematical one: How many days credit does defendant have coming?

On this record, we cannot answer the question of defendant's entitlement to custody credits. The People's moving papers offer no guidance on the calculation; the probation department memorandum neither explains nor documents its choice of dates; the trial judge's remarks at the motion hearing shed no light on the basis for his conclusion. Furthermore, the record fails to show when defendant was apprehended in Idaho; it also fails to disclose whether he remained in custody at all times after his apprehension.

Given the state of the record, remand is appropriate to permit the trial court to reconsider and explain defendant's custody credit calculation.

DISPOSITION

The matter is remanded to the trial court. The court shall determine and award defendant custody and conduct credits, pursuant to sections 2900.5 and 4019. If the calculation results in a change in custody credits, the court shall prepare an amended abstract of judgment and forward it to the California Department of Corrections.

With the exception of a possible revision of custody credits as provided above,
there are no changes in the judgment.

McAdams, J.

WE CONCUR:

Rushing, P.J.

Premo, J.